Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

EDUARDO MORENO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in denying Moreno's Certificate of Appealability, the United States Court of Appeals for the Fifth Circuit erred in not finding that "reasonable jurists could debate" that trial counsel's erroneous advice and gross misrepresentations of the consequences of Moreno's guilty plea induced Moreno to unknowingly and involuntarily plead guilty and thereby deprived Moreno of effective assistance of counsel as guaranteed under the Sixth Amendment and prejudiced him with a LIFE SENTENCE of imprisonment.

PARTIES TO THE PROCEEDINGS

Petitioner, Eduardo Moreno, was a criminal defendant in the United States District Court for the Southern District of Texas, Houston Division. Respondent, United States of America was the plaintiff in the District Court and appellee in the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit filed in this case on April 22, 2008 affirming Petitioner's conviction and sentence.

OPINION BELOW

The Order of the United States Court of Appeals for the Fifth Circuit is unpublished, but can be found at *United States v. Moreno,* USCA No. 07-20279 (5th Cir. April 22, 2008).

STATEMENT OF JURISDICTION

Petitioner appealed from a final Judgment of conviction to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals rendered its unpublished per curium Order on April 22, 2008 affirming the Judgment of the district court entered on April 26, 2007, Hon. Melinda Harmon presiding. This Court has jurisdiction pursuant to Title 28, United States Code, § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. The Proceedings Below

On October 10, 1996, a 197-Count Sixth Superseding Indictment was filed in the United States District Court for the Southern District of Texas, Houston Division, charging, among 78 others including Petitioner's four brothers (Pedro Moreno, Cesar Moreno, Sr., Lazaro Moreno and Luis Moreno), Eduardo Moreno ("Moreno") in Count 1ssss with Conspiracy to possess with intent to distribute and distribution of 1000 kilograms or more of marihuana in violation of 21 U.S.C. § 846; Count 5ssss, conspiracy to launder monetary instruments in violation of 18 U.S.C. § 1956(h)-6801; Count 20ssss, conspiracy to travel in aid of racketeering enterprise in violation of 18 U.S.C. § 371; Counts 24ssss-26ssss, possession with intent to distribute 100 kilograms or more of marihuana in violation of 21 U.S.C. § 841(a)(1); Count 29ssss, possession with intent to distribute 100 kilograms or more of marijuana in violation of 21 U.S.C. § 841(a)(1); Counts 96ssss- 98ssss, laundering of monetary instruments in violation of 18 U.S.C. § 1956-6801; Counts 100ssss-101ssss, possession with intent to distribute 1000 kilograms or more of marihuana in violation of 21 U.S.C. § 841(a)(1);Counts

103ssss-104ssss, money laundering in violation of 18 U.S.C. § 1956-6801; Count 105ssss, possession with intent to distribute marihuana (1000 kilograms or more) in violation of 21 U. S. C. § 841(a)(1); and Count 108ssss, possession with intent to distribute 100 kilograms or more of marijuana in violation of 21 U.S.C. § 841(a)(1); and 168ssss-176ssss, money laundering in violation of 18 U.S.C. § 1956-6801.(5 R. 262-602)

On May 28. 1998, Moreno entered a guilty plea pursuant to a written Plea Agreement on Counts 1ssss and Counts 168ssss-176ssss of the Sixth Superseding Indictment.(2 R. 1504)

On March 30, 2001, Moreno was sentenced to Life Imprisonment as to Count 1ssss with 5 years Supervised Release; Counts 168ssss-176ssss, 240 months imprisonment as to each count to run concurrently and 3 years of Supervised Release; $25,000 fine for all counts; and a Mandatory Special Assessment Fee of $550.00. All remaining counts were dismissed by Motion of the government.(1 R. 1643)

On April 4, 2001, Moreno timely filed a Notice of Appeal.(1 R. 1663)

On November 21, 2002, Moreno's Direct Appeal was dismissed.

On January 23, 2004, Moreno filed a Motion to Vacate, Set-aside, or Correct Sentence under 28 U.S.C. § 2255 (§2255 Motion).

On March 26, 2007, the Court issued a Memorandum and Order dismissing Moreno's §2255 Motion. On April 6, 2007, a timely Notice of Appeal was filed.

On April 26, 2007, the district court issued an Order denying Moreno's Certificate of Appealability ("COA").

On December 12, 2007, Moreno filed a COA with the United States Court of Appeals for the Fifth Circuit.

On April 22, 2008, the Fifth Circuit issued an Order denying Moreno's COA.

B. The Factual Background

Beginning in 1986 and continuing through approximately 1996, a marijuana drug organization ("Moreno/Riojas Organization") operated in Starr County, Texas which distributed or possessed with the intent to distribute over 750,000 pounds of marijuana. The organization was headed by Pedro Moreno, Ricardo Riojas, Ramiro Riojas, Roberto Riojas, Sr., Renato Riojas and Appellant's brothers Cesar Moreno, Sr., Luis Moreno, Lazaro Moreno as well as Petitioner.

The Moreno/Riojas Organization was very fluid and dynamic. The marijuana was basically imported from Mexico to the Starr County area in Roma, Texas. The marijuana was temporarily stored in various locations in and around Starr County, Texas. From there, the marijuana was transferred to customers in Houston, Texas, Georgia, Michigan, Ohio and other places

throughout the United States resulting in seizures. During its tenure, the organization was allegedly comprised of one hundred plus individuals, most of whom were related by blood or marriage and seventy-nine of whom were ultimately indicted in the case at bar. The Moreno/Riojas Organization allegedly generated gross receipts of $750,000,000 from the sale of the marijuana.

At sentencing, Petitioner was held accountable for 89,213.6 kilograms of marijuana. Petitioner was sentenced to a LIFE SENTENCE of Imprisonment.

REASON FOR GRANTING THE WRIT

In denying Moreno's Certificate of Appealability, the United States Court of Appeals for the Fifth Circuit erred in not finding that "reasonable jurists could debate" that trial counsel's erroneous advice and gross misrepresentations of the consequences of Moreno's guilty plea induced Moreno to unknowingly and involuntarily plead guilty and thereby deprived Moreno of effective assistance of counsel as guaranteed under the Sixth Amendment and prejudiced him with a LIFE SENTENCE of imprisonment.

On February 25, 2003, this Court decided *Miller-El v. Cockrell,* 123 S. Ct. 1029 (2003), an obvious companion case to the Court's prior holding in *Slack v. McDaniel,* 529 U.S. 473 (2001) elucidating the standards governing the issuance of COAs. A petitioner seeking a Certificate of Appealability

("COA") must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). In *Miller-El,* the majority drew heavily on this Court's elaboration of this standard in *Slack,* wherein this Court held that the statutes standard is met if petitioner shows that the correctness of the district court's resolution of the constitutional claim is debatable or wrong among jurists of reason, or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further. As such, the decision whether to issue a COA calls for "an overview of the claims in the habeas petition and a general assessment of their merits". Petitioner need not prove that some jurists, or for that matter three, would ultimately grant the petition; only that the question is debatable on the underlying claim(s), not the resolution of the debate. *Id.*

Where a district court has rejected the constitutional claims of a Petitioner on the merits, the showing required to satisfy 28 U. S. C. § 2253(c) is straightforward. The Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

The COA statute required a threshold inquiry into whether the Circuit Court may entertain an appeal. Under the controlling standard, the Court must make a gateway examination of the district court's application of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), to Moreno's constitutional claims, and ask whether that resolution was debatable among jurists of reason or, for that matter, wrong.

In the case at bar, Moreno attacks the voluntary and intelligent character of his guilty plea based on the erroneous advice and gross misrepresentations of the consequences of the guilty plea he received from an ineffective trial counsel. See *Toller v. Henderson*, 411 U.S. 258 (1973). To be constitutionally valid, a guilty plea must be knowing and voluntary. *Harmason v. Smith,* 888 F.2d 1527, 1529 (5th Cir. 1989). Thus, a guilty plea may be invalid if induced by defense counsel's unkept promises. See *Id.* A defendant may seek habeas relief on the basis of alleged promises, though inconsistent with representations he made in open court when entering his guilty plea, by proving, (1) the exact terms of the alleged promise, (2) exactly when, where, and by whom the promise was made, and (3) the precise identity of an eyewitness to the promise. See *Harmason,* 888 F.2d at 1529 (citations omitted).

In the case at bar, trial attorney Ivan R. DeVictoria promised Moreno that he would receive a sentence ranging from 10 to 20 years if he pled guilty and debriefed about what his actions were and told the truth.

A defendant who pleads guilty must be aware of "the relevant circumstances and likely consequences" surrounding the plea. *Brady v. United States*, 397 U.S. 742 (1970).

It is counsel's job to provide a defendant an "understanding of the law in relation to the facts". *Walker v. Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973). A plea induced by misrepresentation of counsel is ineffective. See *United States v. French*, 719 F.2d 387, 390 (11th Cir. 1983).

It is axiomatic that a guilty plea "lacks the required voluntariness and understanding if entered on advice of counsel that fails to meet the minimum standards of effectiveness derived from the Sixth Amendment." *Trahan v. Estelle*, 544 F.2d 1305, 1309 (5th Cir. 1977).

"If the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowingly and voluntary because it will not represent an informed choice". *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974).

The fact that the trial court properly conducted the Plea Hearing does not guarantee that the plea is constitutionally valid when Moreno was not adequately counseled and informed by his attorney to have made a knowing and voluntary plea. See *United States v. Moreno-Mercado,* 808 F.2d 796 (11th Cir. 1987).

In the case at bar, counsel failed to correctly familiarize himself with the relevant guidelines and facts of the case at bar. He then erroneously advised Moreno that if he accepted the plea he would face a guideline sentence ranging from 10 to 20 years imprisonment. Counsel erroneously based this range on the conduct in the factual basis proffered by the government at the Rule 11 Rearraignment Hearing. Counsel failed to consider and advise Moreno of the effects of relevant conduct pursuant to U.S.S.G. § 1B1.3 and the potential sentencing hazard it provides. In effect, Moreno's attorney allowed Moreno to enter his plea blindly and with no appreciation for the real consequences, such as the blind leading the blind.

Moreno had a strong desire to proceed to jury trial and would **not** have pled guilty had counsel informed him that conduct of dismissed counts and that of co-conspirators would be considered for sentencing purposes. He would have insisted on proceeding to a jury trial to determine facts of alleged criminal conduct. Further, counsel failed to consider and advise Moreno the possible offense level increase for obstruction of justice on acts allegedly committed before Moreno's arrest in this case and that other participant's possession of firearms would also result in additional offense level increases. Counsel further induced Moreno to plead guilty by informing him that he would receive a 3-point offense level reduction for acceptance of responsibility for his guilty plea therein reducing his sentencing exposure that he would not otherwise qualify for if convicted by jury trial. Counsel failed to familiarize himself with the facts and law of the case in order to advise Moreno of the actual correct options available, thereby performing below a standard of reasonableness. See *Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. 1981). Had counsel familiarized himself with the facts and researched the applicable guidelines, he would have been able to correctly inform Moreno of the applicability of relevant conduct and its use by the Court in determining his Sentence.

By failing to research the law and facts of the case and advise Moreno how relevant conduct would effect his sentence before entering a guilty plea, counsel made certain that Moreno's plea could **not** have been knowingly and voluntarily entered.

Trial counsel induced Moreno's guilty plea based on erroneous advice and gross misrepresentations which renders the guilty plea itself involuntary, unintelligently entered and null and void due to ineffective assistance of counsel. See *United States v. Rumery*, 698 F.2d 764 (5th Cir. 1983). Moreno, who did not have any prior experience with the criminal justice system and was unschooled in law, wholly relied on his attorney's advice. Absent counsel's promise that Moreno would receive a sentence ranging between 10 to 20 years, Moreno would **not** have pled guilty and would have insisted on proceeding to jury trial. Counsel's promise that Moreno would receive said sentence induced him to enter the guilty plea. Counsel's gross misrepresentation that he had negotiated a Plea Agreement which provided that Moreno would not receive near the Maximum penalty – LIFE IMPRISONMENT – constitutes ineffective assistance of counsel and requires an Evidentiary Hearing to permit Moreno an opportunity to prove he would **not** have pled guilty, but would have insisted on proceeding to trial absent counsel's misrepresentations of the guilty plea. See *Slicker v. Wainwright*, 809 F.2d 768 (11th Cir. 1987).

Moreno did not receive what his attorney advised he would receive in return for entering a guilty plea pursuant to his attorney's explanation of the Plea Agreement.

Counsel's misrepresentation of material facts relied on by Moreno as inducement to enter into the Plea Agreement and plea of guilty constitutes ineffective assistance and requires an Evidentiary Hearing to

resolve the claim. See *United States v. Sanderson*, 595 F.2d 1021 (5th Cir. 1979).

A pretrial investigation in a criminal case provides the basic foundation on which most defense rests and is a critical stage of the attorney's performance. Counsel's failure to investigate the facts of the Plea Agreement is unconscionable and falls below the demands of the Sixth Amendment. See *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984)(failure to investigate facts of coarse constitutes ineffective assistance).

Had counsel properly investigated the consequences of the Plea Agreement and correctly explained them to Moreno, he would not have accepted the Agreement. Further, had counsel researched the precepts of the Plea Agreement, he would have noticed its ambiguous nature and possible threat to Moreno of non-fulfillment.

Counsel's errors in this case were so flagrant that the Court can conclude that it resulted from neglect or ignorance rather than an informed professional deliberation.

Counsel's misrepresentation that he had negotiated a Plea Agreement which provided, *inter alia*, Moreno would receive a Sentence ranging from 10 to 20 years constitutes ineffective assistance and requires an Evidentiary Hearing to allow Moreno an opportunity to prove he would **not** have pled guilty but would have instead insisted on proceeding to trial by jury, absent counsel's misrepresentations of the Plea Agreement. See *Slicker*, supra.

At the Rearraignment Hearing, attorney Ivan R. Lopez de Victoria induced Moreno to plead guilty by saying that he had to do it. Mere inaccurate predictions do not constitute ineffective assistance, but the gross mischaracterization of the likely outcome, combined with erroneous advice and lack of accurate information on the possible effects of going to trail, fell below the level of competence required of defense attorneys. The crux of the issue is that Moreno's attorney's statements in the course of counselling him amounted to a lack of accurate factual information, insufficient information and a wholly inaccurate opinion or prediction. Pleading guilty to a walking death Sentence without parole is something a defendant should be allowed to do **only** over the strenuous objections of his attorney. This was **not** the case of a plea to a lesser bargained-for offense or to an offense for which some sentence consideration is possible. Under circumstances such as these, there is **no** conceivable justification for defense counsel **not insisting** that the government be put to their proofs. The core of Moreno's argument is that the ineffective assistance – the provision of deficient information– was what actually induced him to enter a plea, and therefore the plea was **not** voluntary, knowing and intelligent. The linchpin is that counsel's lack of advice was wholly unreasonable. Moreno's Sentence was LIFE IMPRISONMENT without parole – a walking death Sentence. While an erroneous prediction could still be deemed to be reasonable in some circumstances, it is difficult to imagine situations where providing insufficient information or a lack of information is defensible.

The Plea Agreement itself had no benefits or advantages for Moreno whatsoever.

Obviously, this Plea Agreement had a rachet effect and was strictly one-sided in favor of the government. It had absolutely **no** benefit whatsoever for Moreno considering that the dismissed counts would be used as relevant conduct against Moreno. The result was the maximum Sentence – a walking death Sentence without parole.

Moreno's ineffective assistance of counsel claims are clear and obvious and of constitutional magnitude and satisfies the cause and actual prejudice standards required by *Strickland v. Washington,* 466 U.S. 688 (1984).

Again, it is a fact of human conduct that a client should be tendered and armed with all the professional aspects and facets, especially in a criminal case where freedom is at stake, in order to make an enlightened and thoroughly informed decision regarding their life. Such was just not so in the case at bar. As stated in *Reed v. United States*, 354 F.2d 227, 229 (5th Cir. 1965) and reiterated in *United States v. Grammas,* 376 F.3d 433 (5th Cir. 2004) "one of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether he should enter a plea of guilty." "Failing to properly advise the defendant of the maximum sentence that he could receive falls below the objective standard required by *Strickland." Grammas,* supra. Further, "when the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to

accept a plea or take his chances in court." *Id,* citing *Teague v. Scott,* 60 F.3d 1167, 1171 (5th Cir. 1995)(emphasis ours). "By grossly underestimating the defendant's sentencing exposure . . .[counsel] **breaches** his **duty** as a defense lawyer in a criminal case to advise his client **fully** on whether a particular plea to a charge appears desirable." *Grammas,* supra., citing *United States v. Ridgeway,* 321 F.3d 512, 514 (5th Cir. 2003)(citing and quoting *United States v. Gordon,* 156 F.3d 376, 380 (2nd Cir. 1998))(emphasis ours). The above argument is bolstered under the "objective evidence" precedent cited in *Gordon* where there is a great disparity between the actual maximum sentencing exposure under the Sentencing Guidelines [and/or statute] and the sentence exposure represented by defendant's attorney which provides sufficient objective evidence to establish a reasonable probability that the outcome of the proceedings would differ. In the case at bar, it is glaringly apparent that Moreno would have had a compelling reason to opt for a trial rather than just lay down and die under the sufferance of a Life Sentence, had his attorney properly advised him.

In the case at bar, the misinformation rather than the precise advise of counsel, was essential to Moreno in deciding whether to accept the government's plea offer. As in *United States v. Herrera,* 412 F.3d 577 (5th Cir. 2005), the defense attorney's assistance was deemed deficient even in the face of a mere 27-month increase in sentence which constituted prejudice under the second prong of *Strickland* finding that "any amount of jail time" applies where the defendant was convicted after this Court's decision in *Glover v. United States,* 531 U.S. 198, 203 (2001). Pursuant to Moreno's

COA filed in the Fifth Circuit; the Fifth Circuit should have strenuously and dispassionately adhered to its own previous precedent in *Herrera* that "the better approach is to have the district court conduct an evidentiary hearing . . . [which] will confirm or dispel [the] allegation that [the] attorney misrepresented the prison time he faced and whether [the defendant] relied on those misrepresentations . . ." *Herrera,* supra. at 582. To do so otherwise would seriously affect the fairness, integrity, and public reputation of judicial proceedings. A Life Sentence was significantly more compelling than the uninformed mere 20 year sentence erroneously stated by Moreno's counsel in order to prove actual prejudice.

It is essential to note, as earlier referenced in the Statement of the Case, Subparagraph-A, that the exact same procedural case scenario occurred and impacted Moreno's four other brothers (Pedro Moreno, Cesar Moreno, Sr.. Lazaro Moreno and Luis Moreno) who were co-defendants in the same Indictment, wherein their respective defense attorneys rendered ineffective assistance of counsel by failing to properly advise them of their potential respective sentencing exposures, and to which they all plead guilty and received Life Sentences. Therefore, it is respectively submitted that should this Court rule favorably herein, that this precedent will become the law of the case and inure to their respective benefit.

CONCLUSION

Accordingly, Moreno respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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